

University of New Haven and University of New Haven Board of Faculty Welfare, Local No. 3956, C.S.F.T.-A.F.T. Cases 39-CA-23, 39-CA-181, and 39-CA-183

26 August 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND HUNTER**

On 12 July 1982 Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,¹ findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.

¹ The General Counsel has excepted, *inter alia*, to the Administrative Law Judge's rejection of G.C. Exh. 148, the 1980 accreditation report from the Commission on Institutions of Higher Education of the New England Association of Schools and Colleges. We find merit to the General Counsel's exception. Contrary to the Administrative Law Judge's ruling, the Board traditionally has found such accreditation reports relevant, and has relied on them in reaching its decisions. See, e.g., *Bradford College*, 261 NLRB 565 (1982). Moreover, the accreditation report falls within Rule 803(6) and/or Rule 803(24) of the Federal Rules of Evidence and may therefore be admitted into evidence despite its hearsay nature. Accordingly, the Administrative Law Judge's ruling excluding G.C. Exh. 148 is hereby reversed, and the report is admitted into evidence.

² The Administrative Law Judge's Decision contains several inadvertent errors. The Supreme Court's opinion in *NLRB v. Yeshiva University* appears at 444 U.S. 672 (1980). The instant complaints alleged that the Charging Party was a labor organization within the meaning of Sec. 2(5) of the Act, and not that it was *not* a labor organization. Finally, in sec. III.B. of his Decision, the Administrative Law Judge found that Respondent's academic standing and admission committee was a committee of the faculty senate. As pointed out by the General Counsel, that committee was not under the auspices of the faculty senate but was, rather, composed primarily of administration officials. We hereby correct these errors, which do not affect the result we reach herein.

³ The General Counsel correctly notes that the Administrative Law Judge ignored certain uncontradicted evidence and failed to resolve issues involving certain other, conflicting, evidence. While the extreme brevity and generality of the Administrative Law Judge's Decision is unfortunate, we are convinced from a careful review of the record that the faculty has substantial authority to recommend decisions which formulate, determine, and effectuate management policies, and that those recommendations are, in most cases, effective. For example, during the 6-year period immediately prior to Respondent's refusal to bargain, the faculty promotion and tenure committee submitted 123 positive recommendations to Respondent's president. The president followed all of those recommendations. During that same period, the president declined to follow negative recommendations of the faculty in only five instances. Similarly, the recommendations of the faculty sabbatical leave committee have been followed by the administration in every instance save one, and in that case the administration accepted the faculty committee's alternate recommendation. In the area of full-time faculty hiring, it appears that the recommendations of the existing faculty are followed in about 90 percent of all cases. Though not clear from the record, it further appears

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

that faculty or departmental recommendations concerning the hiring of part-time and adjunct faculty are followed in almost every instance, although some undeterminable but apparently small percentage of such hiring may be performed with little or no input from the full-time faculty.

In view of the result reached herein, we find it unnecessary to pass on the Administrative Law Judge's finding that, even apart from *Yeshiva* considerations, the Charging Party's "constitutional" grievance responsibilities preclude it from being a labor organization within the meaning of Sec. 2(5) of the Act.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: In 1978, the Court of Appeals for the Second Circuit, in *NLRB v. Yeshiva University*, 582 F.2d 686, held that the University's full-time faculty members were managerial employees within the meaning of the Act. On February 20, 1980, the Supreme Court affirmed at 442 U.S. 938.

Relying on *Yeshiva*, the University of New Haven declined to bargain with the Board of Faculty Welfare (hereafter BFW) which had been certified in 1976 as the exclusive bargaining representative of its full-time faculty, department chairmen, associated deans, and coordinators.

These consolidated complaints followed, alleging a number of 8(a)(1) and (5) violations based on the University's refusal to furnish BFW with copies of individual faculty member contracts of employment allegedly necessary for bargaining, its withdrawal of recognition of BFW as bargaining agent, its unilateral granting of a wage increase and other benefits following expiration of the labor contract, and its refusal to recognize the method by which BFW elected its members to the University's Tenure and Promotion Committee.

In its answers, as amended orally at the hearing, the University denies that any bargaining unit members are "employees" within the meaning of Section 2(3) of the Act and that BFW is a "labor organization" within the meaning of Section 2(5).

Twelve days of hearings were conducted between April and November 1981 and extensive briefs (including supplemental briefs following the Board's April 30, 1982, decisions in *Bradford College*, 261 NLRB 565 (1982), *Montefiore Hospital*, 261 NLRB 569 (1982), *Ithaca College*, 261 NLRB 577 (1982), *Thiel College*, 261 NLRB 580 (1982), and *Duquesne University*, 261 NLRB 587 (1982)), were filed during the period of March through July 1982.

From the extensive record there emerges three conclusions: the first, that the full-time faculty is an important, integral, and inseparable constituent of the shared governing authority at the University; the second, that each

such faculty member is a managerial employee and thus possesses no organizational rights protected under the Act; and the third, that BFW, being composed exclusively of managerial employees and serving as representative of the University for the adjustment of grievances, is not a labor organization under the Act.

Accordingly, the consolidated complaints are dismissed.

I. JURISDICTION

The complaints allege, the answers admit, and I find that Respondent, a private nonprofit University with annual revenues in excess of \$1 million and annual interstate purchases in excess of \$50,000, is an employer within the meaning of Section 2(2) of the Act.

II. LABOR ORGANIZATION

The complaints allege, the answers as amended orally at the hearing deny, and I find, for reasons set forth below, that the Board of Faculty Welfare is not a labor organization within the meaning of Section 2(5) of the Act. *Masters, Mates & Pilots v. NLRB*, 486 F.2d 1271 (D.C. Cir. 1973), cert. denied 416 U.S. 956 (1974).

III. THE UNFAIR LABOR PRACTICES

A. The Organization

The University is a major fully accredited private institution of higher education in Connecticut, offering more than 100 graduate and undergraduate degree programs through 5 schools (arts and sciences, business administration, English, professional studies and continuing education, and the graduate school) at its main campus in West Haven and at 7 other locations throughout the State.

A 51-member board of governors (which includes 2 full-time and 1 part-time faculty members) and an executive committee of the board constitute the supreme policymaking and fiscal authority at the university.

The chief operating officials of the University are its president and provost. The former, selected by Board on the basis of recommendations of a search committee chaired by a full-time faculty members, and whose membership was comprised of administrative officials, full-time faculty members, and members of the public, provides the academic and fiscal leadership within the framework of policies established by the board. The provost serves to implement academic policies and to coordinate academic programs administered within the various schools and departments to ensure that the University's fiscal constraints are met, that affirmative action requirements of the Federal and state governments are satisfied, and that course offerings and locations are scheduled to minimize conflicting demands on University resources and maximize the benefit to the student body. Together with other administrative officials and their staffs, the president and provost provide a centralized process for the orderly conduct of the University's academic function, thus freeing the full-time faculty to perform its principal function of constructing and administering the University's academic program.

Each school is headed by a Dean who is not a member of the bargaining unit. Each is appointed by the president on the basis of recommendations of a search committee comprised of full-time faculty members or the vote of the full-time faculty members of that school. A number of schools have one or more associate deans who are members of the bargaining unit and whose duties generally are to serve as liaison between the dean and the faculty.

Department chairmen are members of the bargaining unit and are chosen, with rare exception, by the department's full-time faculty either on the basis of a consensus vote or the recommendation of a search committee comprised of full-time faculty members who define its scope and determine the results of the search. Thereafter, chairmen are periodically evaluated by the full-time faculty.

Full-time faculty members are recruited, interviewed, and effectively selected by the existing full-time faculty members, under somewhat uniform search procedures initiated by the department itself based on its projected needs. Except in rare instances, the recommendations of the faculty are accepted by the dean and the provost. As discussed below, the faculty members initiate the construction, adoption, and revision of course offerings.

Part-time faculty members, who are not within the bargaining unit, are recruited, hired, and supervised entirely by department chairmen or coordinators (responsible for overseeing a particular academic program within a department). Clerical and student employees, similarly not within the bargaining unit, are hired and supervised exclusively by those chairmen and full-time faculty members for whom they work.

In 1968, a "Constitution of the Full Time Faculty of the University of New Haven" went into effect. The constitution established a "General Faculty Meeting" which consists of all full-time faculty members (generally considered to be anyone required to teach 12 or more hours per year). The general faculty meeting, in turn, consists of two bodies: the faculty senate and the board of faculty welfare. The faculty senate, composed of 22 members, is the executive committee of the general faculty meeting and has jurisdiction over matters of an academic nature. The board of faculty welfare, composed of 14 members, has jurisdiction under the constitution over matters pertaining to salary structures, fringe benefits, hours, working conditions, tenure, grievances, and other matters dealing with "faculty welfare." More particularly, BFW is authorized under the constitution to hear cases on behalf of the University involving academic freedom, tenure, and all cases involving group or individual faculty grievances. BFW also has authority to make all decisions on promotions and tenure and, as to that function, deals through a subcommittee, the tenure and promotion committee.

On February 17, 1976, BFW was certified, pursuant to a stipulation, as the exclusive bargaining representative for all full-time faculty members, department chairmen, coordinators, associate deans, and grant officers. On December 17, 1976, BFW and the University entered into a labor agreement effective September 1, 1976, through

August 31, 1979. Following *Yeshiva*, the University has withdrawn its recognition of BFW and has declined to bargain collectively with it.

B. Faculty Role in Academic Spheres

Course offerings are designed by individual faculty members or faculty groups working within their academic departments to meet particular academic needs, the interests of particular faculty members, or the needs of students. They are initiated at a faculty or department level, and reviewed and approved by the curriculum committee of the school, the full faculty senate, the dean, and the provost. The role of the administration in practice is limited to a coordinating function. New courses have been disapproved where they duplicate an identical existing course, for financial reasons and for inconsistency with the University's academic goals in general. While new courses on occasion are recommended by the administration, the primary authority for course formulation nevertheless rests at all times with the faculty.

Program offerings, like course offerings, are left to the discretion and expertise of the faculty. Examples abound of entire programs being constructed, proposed, and implemented by faculty members: the taxation and business law programs, the computer education program, programs leading to masters degrees in gerontology and the humanities, the remedial English program, and the criminal justice program. And, as with course offerings, the administration has on rare occasion proposed a program, such as a modular program to be offered at a major shipyard in Groton.

Course scheduling is the primary responsibility of departmental faculties and chairmen. A proposed schedule is submitted to the dean for approval and, except in cases of conflicting demands for classrooms and laboratory facilities, is routinely approved by the administration.

Admission to the undergraduate school is determined under standardized criteria and, accordingly, neither the administration nor the faculty plays a role in this area. Admissions to the graduate programs, on the other hand, are determined by the individual faculty members within the particular graduate program. Moreover, faculty has established readmission standards and standards for allocation of departmental scholarships.

Academic standards policy is determined by the academic standards' committee of the faculty senate and it has studied such matters as student course load, transfer credit policy, and grade inflation. The academic standing and admissions committee of the faculty senate is responsible for evaluating the academic status of individual students and possesses authority to place students on probation or to dismiss them. Faculty members and department chairmen determine the value to be given transfer credits.

Graduation eligibility is determined initially by the faculty and the chairman of the student's department and ultimately and finally by the faculty senate. The administration has no discretion in this matter.

Teaching methods, teaching loads, and course allocations are determined by individual faculty members.

Grading policies are established in a standardized university grading system and there is no evidence how this

policy was established. In at least one area, business law, departmental policy required the maintenance of a B average. Grade changes after the close of a semester must be approved by the committee on instruction, a faculty committee.

Student body size in the undergraduate schools is the product of a university policy to admit all qualified students and there is little direct authority on the part of the administration or the faculty in this matter. The contrary exists at the graduate school level, where faculty members directly control size through their admissions and retention authority. The faculty of the division of accounting has developed an advertising campaign to attract students and high school teachers were recruited by the faculty for the teacher computer program. And faculty has defined limits on class size for programs within the accounting division, the executive MBA program, and the management sciences department.

Tuition is set by the board of governors.

Physical resources are allocated by the administration in its role to coordinate conflicting demands by the faculty. Faculty has had a direct impact on new construction through consultation with architects in the design and layout of space for the music department, biology department, art department, and forensic sciences department.

The status of academic disciplines is effectively determined by the faculty. A proposal to create the school of professional studies and continuing education was initiated by the faculty and created by action of the faculty senate, which required periodic review of the school thereafter by a faculty committee. A faculty proposal to give school status to the criminal justice program was supported by the administration but was finally rejected by the faculty senate. A faculty proposal to create a school of accounting, supported by the administration, likewise was rejected by the faculty senate. The faculty senate, acting on a faculty proposal, decided to transfer the remedial English program from the general studies department to the English department. And the faculty senate, acting on a faculty proposal, approved the transfer of the chemistry department from the school of arts and sciences to the school of engineering.

The University budgetary process is comparable with that in any business or government. Individual faculty members submit requests to the department chairman who prepares a departmental budget for submission to the dean, where approval is obtained in all but rare instances. Hearings are conducted at the University level and faculty members and chairmen are afforded the opportunity to give supporting testimony. Thereafter, the provost, playing a coordinating role, reviews the competing budget requests and makes allocations as required by the limited financial resources of the University. Frequently, further cuts are made during the year because of income shortfall.

C. Faculty Role in Nonacademic Spheres

The hiring of full-time faculty members, as indicated above, is the responsibility of the full-time faculty, which determines need and creates, charges, and staffs the

search committees. Their recommendations are adopted in virtually every case. The hiring of part-time faculty members, clerical employees, and student employees also is a departmental responsibility.

The hiring and evaluation of deans, as indicated above, likewise is a responsibility of the faculty. In one case, the exception to the rule, the president himself appointed a dean to fill a vacancy caused by the sudden death of the incumbent. This action was taken not to circumvent the role of the faculty, but rather to prevent a hiatus in negotiations with a major shipyard as to development of a new program to be offered at the shipyard.

The hiring of department chairmen, as indicated above, is the function of the full-time faculty, through the use of search committees or by consensus vote of the department faculty members.

The hiring of the current president was accomplished by search committee, chaired and partially staffed by the faculty.

The evaluation of full-time faculty members, although not on any regular basis, is the function of the tenure and promotion committee of the board of faculty welfare when it considers petitions for promotion or tenure. There exist an informal system for peer evaluation which, on occasion, effectively results in adverse employment action.

The evaluation of chairmen is, with rare exception, the responsibility of department faculty and is a routine function which, on occasion, effectively results in the removal of a chairman.

The evaluation of deans is the exclusive responsibility of the faculty. Four deans were evaluated pursuant to faculty constitution bylaw 5 (which called for such a review every 3 years) and three received a favorable recommendation and retained their posts. The fourth received a negative recommendation and resigned.

Termination of full-time faculty members, albeit rare, is effectively initiated and recommended by the faculty itself. The record contains several examples of faculty action which resulted in the removal of several faculty members and one chairman.

Tenure and promotion is a responsibility of the tenure and promotion committee of the BFW, created under the faculty senate. Its membership consists of six faculty members elected by their peers and the president and the provost. The chairman of the BFW serves as chairman *ex officio*. Because a recommendation requires six votes, the faculty effectively controls all decisions of the committee. Petitions are evaluated by the committee, testimony may be heard and a final report is submitted to the president who, with rare exception, adopts the report. The record indicates that, in a 6-year period, all 123 committee recommendations were adopted. In the 1978-79 academic year, the committee recommended favorable action on 11 of 30 petitions and their recommendation was adopted by the president. However, he disagreed with their rejection of five and granted tenure or promotion, having determined that the committee had applied a new and improper standard for determining the teaching experience of the applicants.

Paid sabbatical leave is the absolute responsibility of the sabbatical leave committee, established under the fac-

ulty constitution. Requests are evaluated by the committee and recommendations are forwarded to the president. The record reflects one instance of presidential disapproval, that being a case where the proposed sabbatical year study was outside the faculty member's area of teaching responsibility, and University funding was disapproved for want of a benefit to the University. The president did approve the committee's recommendation of an alternate.

Leaves of absences are considered by department chairmen in consultation with department faculty and recommendations are made to the Dean. There is no evidence that any departmental recommendation has been rejected.

Grievance handling on behalf of the University is the delegated responsibility of BFW under the faculty constitution. It should be noted that this constitutional function is distinct from BFW's role in prosecuting contract grievances under the grievance-arbitration provisions of the expired labor agreement. That provision specifically excluded grievances regarding reinstatement, tenure, promotion, or termination, thus reserving those disputes for the constitutional grievance procedures. BFW thus wore two hats: one as representative of the University under the constitution for the handling of student-faculty, faculty-faculty, and faculty-administration grievances; the other as representative of bargaining unit members in prosecuting grievances under the contract. Wearing its constitutional hat, BFW conducts hearings and issues recommended reports to the president, which may include a recommendation for termination of faculty members. In this constitutional capacity, BFW acts on behalf of the University as the University's primary grievance-handling officer.

The threshold issue presented is whether the University's full-time faculty, department chairmen, associate deans, and coordinators are managerial employees without organizational rights protected under the Act. Resolution of that issue in the affirmative disposes of all allegations of the complaint and, in addition, compels dismissal for the further reason that BFW, as representative of managerial employees exclusively and as agent of the University for grievance handling, cannot as a matter of law be a labor organization under the Act.

Yeshiva, supra, represented "a substantial change in the state of the law regarding the supervisory and/or managerial status of faculty members," *Milton College*, 260 NLRB 399, 400 (1982), reversing a long line of Board decisions on the issue.

In its April 30, 1982, unanimous decisions in *Bradford College*, *Montefiore Hospital*, *Ithaca College*, *Thiel College*, and *Duquesne University, supra*, the full Board said of *Yeshiva*:

There, the Court defined managerial employees as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" through "taking or recommending discretionary actions that effectively control or implement employer policy." The Court noted, however, that it was not suggesting an "application of the managerial exclusion that

would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." [*Bradford College*, 261 NLRB at 565.]

In *Yeshiva*, the Supreme Court found that the faculty effectively determined the curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. The Court noted that the faculty's power at *Yeshiva* extended beyond strictly academic concerns. Thus the faculty also made recommendations to the dean concerning hiring, tenure, sabbaticals, terminations, and promotions. Although final decisions were made by the central administration on advice of the dean, the Court noted that an overwhelming majority of faculty recommendations were followed. Based on these findings, the Court held that the faculty members at *Yeshiva* exercised managerial functions and were, therefore, excluded from the Act's coverage. [*Duquesne University*, 261 NLRB at 588.]

The Board, while using *Yeshiva* as a factual yardstick, cautioned that the measurement is not to be a purely mechanical one:

Although the authority of the Duquesne Law School faculty with respect to the termination of teachers is less than that exercised by the *Yeshiva* faculty, we do not find this determinative, given the similar authority exercised in other areas as outlined previously.

In sum, it is evident from the record that the managerial authority possessed by the Duquesne law school faculty is nearly identical to that possessed by the faculty in *Yeshiva* in such critical academic matters as curriculum, grading systems, and admission and matriculation standards. Further, as in *Yeshiva*, the faculty here exercises its authority in nonacademic matters, including decisions concerning hiring and tenure. In view of all the foregoing, we find that the full-time faculty members sought by Petitioner are managerial employees. Accordingly, we shall dismiss the petition. [*Duquesne University*, *id.* at 598.]

Here, as noted above, the faculty effectively determines course and program offerings, course scheduling,

admission to the graduate program, academic standards policy, graduation eligibility, teaching methods and teaching loads, student body size at the graduate school level, the use of physical resources, and the construction of new facilities and the status of academic disciplines and has substantial input in the budgetary process. In nonacademic areas, it effectively hires deans, chairmen, full-time and part-time faculty members and student employees, evaluates and effectively determines promotion and tenure of faculty members, evaluates chairmen and deans and grants paid sabbatical leave.

In short, except for fiscal affirmative action and broad academic policies established by the board of governors and except for the coordinating responsibility of the University's administration officials, it can be said that the full-time faculty of the University of New Haven plays a major and effective role in the formulation and effectuation of those broad management policies established by its board of governors. On this record, the conclusion is escapable that the full-time faculty, including department chairmen, associate deans, and coordinators, are managerial employees without organizational rights protected by the Act.

Moreover, BFW is not a labor organization under the Act as it is comprised exclusively of managerial employees and for the further reason that, in connection with its constitutional responsibility to hear and determine grievances on behalf of the University, it acts as a bargaining representative of the University. *Masters, Mates & Pilots v. NLRB*, *supra*.

Accordingly, the consolidated complaints must be dismissed in their entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record and, pursuant to Section 10(c), I hereby issue the following Order:

ORDER¹

It is ordered that the consolidated complaints be, and the same hereby are, dismissed.

¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.